BOOK REVIEWS

The Spirit of the Common Law. By Roscoe Pound. Boston, Marshall Jones Co., 1921. pp. xv, 224.

Dean Pound's main thesis in this volume is that there is a fundamental mode of thought, inherited from feudalism, "a mode of dealing with legal situations and with legal problems . . . . which has always tempered the individualism of our law, and now that the change from a pioneer, agricultural, rural society to a settled, industrial and commercial and even predominantly urban society calls for a new order of legal ideas, has been the chief resource of the courts in the movement which has long been proceeding quietly beneath the surface in judicial decision." * * * * "The first solvent of individualism in our law and the chief factor in fashioning its system and many of its characteristic doctrines was the analogy of this feudal relation, suggesting the juristic conception of rights, duties and liabilities arising, not from express undertaking, the terms of any transaction, voluntary wrongdoing or culpable action, but simply and solely as incidents of a relation." (pp. 15, 20.)

Our public law, the author says, is founded on *Magna Carta.* "But Professor Adams has shown that, as a legal document, Magna Carta is a formulation of the duties involved in the jural relation of the king to his tenants in chief. As the Middle Ages confused sovereignty and property, it was easy enough to draw an instrument declaring the duties incident to the relation of lord and man which, when the former happened to be king, could be made later to serve as defining the duties owing by the king in the relation of king and subject." (pp. 25, 26.)

That every man has certain natural rights deduced from a social compact is pronounced to be "an alien conception in our law. After working no little mischief in our constitutional law in the nineteenth century, this conception of natural rights going back of all constitutions and merely declared thereby is giving way and there are signs that we shall return to the true common-law conception of the rights and duties which the law imposes on or annexes to the relation of ruler and ruled." (p. 26.)

Maine's position that the evolution of law is a progress from *status* to contract "is a generalization from Roman legal history only. It shows the course of evolution of Roman law. On the other hand it has no basis in Anglo-American legal history, and the whole course of English and American law to-day is belying it, unless indeed, we are progressing backward." (p. 28.)

In studying the characteristics of the growth of American common law, Dean Pound marks it off into two periods.

"These periods are (1) the classical common-law period, the end of the sixteenth and beginning of the seventeenth century, and (2) the period that some day, when the history of the common law as a law of the world comes to be written, will be regarded as no less classical than the first—the period of legal development in the United States that came to an end with the Civil War. In the one the task was to go over the decisions and legislation of the past and make a system for the future. In the other the task was to examine the whole body of English case law with reference to what was applicable to the facts of life in America and what was not." (pp. 41, 42.)

This description of what is presented as a second period seems to make too much of English case law as a source of authority. It ignores the claims of legal philosophy and right reason to a share in the work. It limits the field by excluding consideration of the judicial precedents of continental Europe.

Dean Pound discusses at some length the historical events which illustrate his subject, and emphasizes its character as a branch of social science.

"At common law the king is *parens patriae,* the father of his country, which is but the medieval mode of putting what we mean to-day when we say that the State is the guardian of social interests. In the feudal way of looking at it, the relation of king and subject involved duties of protection as well as rights of allegiance. The king, then, was charged with the duty of protecting public and social interests, and he wielded something very like our modern police power. But this power was limited on every side by the maxims of the common law and the bounds set by the law of the land." (p. 68.)

The notion of the supremacy of law was thus in England bound up with that of the supremacy of the sovereign. It was a natural function of constitutional government.

"We may be assured, therefore, that the supremacy of law, established by the common law against Tudor and Stuart, is not to disappear. We may be confident that we shall have, not merely laws, expressions of the popular will for the time being, but law, an expression of reason applied to the relations of man with man and of man with the State. We may be confident also that in the new period of legal development which is at hand as in like periods in legal history there will be a working over of the jural materials of the past and working into them of new ideas from without. We shall be warranted in prophesying that this working over will be effected by means of a philosophical theory of right and justice and conscious attempt to make the law conform to ideals. Such a period will be a period of scientific law, made, if not by judges, then by lawyers trained in the universities; not one of arbitrary law based on the fiat of any sovereign, however hydra-headed. For the notion of law as the will of the people belongs to the past era of a complete and stable system in which certainty and security were the sole ends. Throughout legal history law has been stagnant whenever the imperative idea has been uppermost. Law has lived and grown through juristic activity. It has been liberalized by ideas of natural right or justice or reasonableness or utility, leading to criteria by which rules and principles and standards might be tested, not by ideas of force and command and the sovereign will as the ultimate source of authority. Attempts to reduce the judicial office in the United States to the purely mechanical function of applying rules imposed from without and of serving as a mouthpiece for the popular will for the moment are not in the line of progress." (pp. 83, 84.)

The guarantees of individual rights established by our constitutions have had in England "to give way to modern legislation. In America they have stood continually between the people, or large classes of the people, and legislation they desire. In consequence, the courts were long put in a false position of doing nothing and obstructing everything, which it was impossible for the layman to interpret aright." (p. 103.) "Men are saying to-day that material welfare is the great end to which all institutions must be directed and by which they must be measured. Men are not asking merely to be allowed to achieve welfare; they are asking to have welfare achieved for them through organized society." (p. 109.)

Legislative law-making the author is disposed to extend rather than restrict. In that connection he tells a good story on the authority of Jhering. A question of commercial law was submitted to a German Law Professor. "He returned an elaborate and thoroughly reasoned answer based upon the principles of the Roman law, the basis of the common law of Continental Europe and hence of legal instruction. Upon suggestion that he had omitted to notice a section of the commercial code which appeared to govern, he responded that if the commercial code saw fit to go counter to reason and the Roman law it was no affair of his." (p. 157.)

Dean Pound regards Kant as the prophet of a new dispensation, who established a new method of legal science,—a new stage of legal development, which characterizes the twentieth century. Kant held that "legal justice" is not immutable. Fate is behind it. "The old natural law called for search for an eternal body of principles to which the positive law must be made to conform. This new natural law called for search for a body of rules governing legal development, to which law will conform do what we may." (p. 163.) "Legal principles are not absolute, but are relative to time and place." (p. 172.) Equity has "sought to prevent the unconscientious exercise of legal rights; to-day we seek to prevent the anti-social exercise of them. Equity imposed moral limitations; the law of to-day is imposing social limitations." (p. 186.)

The author closes with this formula of methodology: "In the past century we studied law from within. The jurists of to-day are studying it from without." (p. 212.) This is a good illustration of one prominent feature of his style of composition. It is compact, and antithetic. He relies much on drawing contrasts. He aims to be plain, and talks straight to the point. He has handled a difficult subject with force and spirit.

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Essays on Constitutional Law and Equity. By Henry Schofield. In Two Volumes. Boston, Chipman Law Publishing Co., 1921. Vol. I, pp. xxiv, 1-456, xxvi. Vol. II, pp. viii, 457-1006.

The late Professor Schofield, of the Law School of Northwestern University, contributed many papers to the Illinois Law Review; and in these volumes the papers are collected by his colleagues.

As the subjects upon which Professor Schofield wrote were usually unsettled contemporary problems, the treatment is, naturally enough, argumentative, rather than expository. Clearness and fairness, combined now and then with a homely thrust, make the papers peculiarly stimulating and attractive.

Take, for example, the first three, covering about one hundred pages. Here the problem discussed is whether a federal question under the Due Process clause of the Fourteenth Amendment is raised whenever a state court, through ignorance of state law, gives an erroneous decision. Is it not true that a state court is an agency of the state? When a state court makes a mistake of law, does not the state through this agency deprive the unsuccessful litigant of life, liberty, or property without due process of law? Such is the author's contention in the first of the papers, which appeared in 1908 and was based upon acute reasoning and upon language used in several opinions of the Supreme Court of the United States. Such is his contention in the second paper, which appeared in 1910. In the third paper, which appeared in 1916, he still makes the same contention; but *Frank v. Mangum* (1915) 237 U. S. 309, 35 Sup. Ct. 582, had been decided meanwhile, and, notwithstanding favorable dicta in that case, the author honestly says:

"There is no clear instance wherein the Supreme Court of the United States reversed a state decision administering the local law of the state on the distinct ground of want of scientia in the state decision on a question of law or a question of fact arising under the local state law so gross as to show that the state decision flowed from abitrary power and not from judicial discretion." (p. 83.)

And again he says:

"It is not easy to tell from the majority opinion, however, whether the court means to say that Frank had no federal right at all that could be denied or abridged by the state of Georgia through its courts, or to say that he did have the federal right stated to have the local law of Georgia concerning jury trial in criminal cases